

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

PAUL CLARK,

Plaintiff,

v.

TRC ENVIRONMENTAL CORP.,

Defendant.

C09-1854-JCC

ORDER

This matter comes before the Court upon Defendant's motion for summary judgment. (Dkt. No. 45). In addition to Defendant's motion, the Court has also considered Plaintiff's response (Dkt. No. 53), Plaintiff's reply (Dkt. No. 56), and the parties' various supporting exhibits and declarations. Having therefore reviewed the relevant record and having concluded that oral argument is unnecessary, the Court hereby GRANTS the motion in part and DENIES the motion in part for the reasons explained below.

Also before the Court is Defendant's motion to exclude evidence. (Dkt. No. 58). The Court hereby DENIES the motion.

1 **I. BACKGROUND**

2 This case sounds in allegations of wrongful termination. Plaintiff Paul Clark alleges that
3 Defendant TRC Environmental Corporation terminated his employment because he refused to falsify
4 air-quality data and because he insisted that the company protect his own medical privacy and the
5 medical privacy of his fellow employees. (Clark Decl. *passim* (Dkt. No. 53-1)). Defendant
6 acknowledges having terminated Plaintiff’s employment, but argues that it did so for an altogether
7 different reason than the reason alleged by Plaintiff. According to Defendant, Plaintiff’s employment
8 was terminated because Plaintiff “displayed increasingly aggressive and disruptive behavior in the
9 workplace.” (Motion 1 (Dkt. No. 45)).

10 **A. Air-Quality Data**

11 Plaintiff, who has worked in air-quality testing since 1982, started working for Defendant in
12 August 2001. (Clark Decl. 2 (Dkt. No. 53-1)). He alleges that he witnessed falsification of air-quality
13 data within a few years of beginning his term of employment with Defendant. Specifically, Plaintiff
14 alleges that co-workers falsified air-quality data which was submitted to the coordinators of a pipeline
15 project and that another co-worker falsified data which was submitted to a glass company. (*Id.* 2–3).
16 According to Plaintiff, he reported each of these incidents to his supervisors. In each case, Plaintiff
17 alleges, his supervisors failed to take any corrective action. (*Id.*).

18 Starting in January 2008, Plaintiff was charged with the responsibility of supervising the
19 company’s air-measurements group in the western United States. He immediately encountered what he
20 considered to be irregularities in the group’s practices. (Clark Decl. 3–7 (Dkt. No. 53-1)). Specifically,
21 Plaintiff grew concerned that group members were manipulating gas-chromatography data in order to
22 provide customers with passing results that were fraudulent. In June 2008, Plaintiff reported these
23 concerns to several of his supervisors, including one of the two individuals who handles ethics
24 complaints on behalf of the company. (*Id.* 7). Two weeks after reporting his concerns, Plaintiff was
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1 removed from his position as group manager for the western United States and re-assigned to the post
2 which he had held previously—manager of the company’s northwest office. Plaintiff describes this
3 transfer as a demotion. (*Id.* 8).

4 After he was transferred, Plaintiff persisted in his efforts to address what he considered to be
5 ethical lapses by his employer. In September 2008, he sent a lengthy email message to Mr. Martin Dodd,
6 Defendant’s general counsel. In the message, Plaintiff described his concerns about Defendant’s practice
7 of falsifying air-quality data and its further practice of covering up its wrongdoing. (Clark Email
8 Message (Dkt. No. 54-1 at 29–32)). Defendant responded to this message and to other expressions of
9 Plaintiff’s concern by launching an internal investigation, which was headed by Mr. Andrew Johnson,
10 an in-house attorney. As the investigation proceeded, Plaintiff sent an email message to Mr. Johnson
11 with the names of other individuals who may have information about Defendant’s alleged misdeeds. Mr.
12 Johnson responded by telling Plaintiff that he was to cease speaking with his fellow employees about the
13 alleged irregularities. Mr. Johnson further stated that Plaintiff had violated the attorney-client privilege
14 by communicating with other employees. (Johnson Email Message (Dkt. No. 54-1 at 34–39)). After
15 receiving this email message, Plaintiff concluded that Mr. Johnson’s investigation was launched in order
16 to cover up problems, not to rectify them. (Clark Decl. 8–9 (Dkt. No. 53-1)).

17 The brewing conflict between Plaintiff and Defendant finally came to a head in mid-July 2009.
18 Plaintiff alleges that his supervisor asked him to perform a trial air-quality test with an individual whom
19 Plaintiff knew to have previously falsified air-quality data. (Clark Dec. 9 (Dkt. No. 53-1)). According to
20 Plaintiff, he refused this request, and was then ordered by his supervisor to appear at an early-morning
21 meeting on July 16, 2009 to address the issue. (*Id.*). At the meeting, company representatives gave
22 Plaintiff the choice of quitting or being fired. Plaintiff refused to quit. His employment was therefore
23 terminated. (*Id.* 9–10).

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1 **B. Medical Records**

2 Starting in late 2007, Plaintiff began to experience concerns about Defendant's procedures with
3 respect to the medical privacy of employees. According to Plaintiff, he first became worried after he and
4 three other employees failed to pass a routine drug pre-test.¹ As he and the other employees were driving
5 to a medical facility for further testing, one employee received a telephone call from his supervisor
6 asking why he had failed a drug test. (Clark Decl. 11 (Dkt. No. 53-1)). Because of this call, all four
7 employees became concerned that their company maintained faulty medical-privacy policies. Plaintiff
8 was chosen as their spokesman with company management. Plaintiff sent an email message to the
9 company's human-resources department in September 2007, complaining that the company's actions
10 had served to "spread [the employees'] names around the company as drug users." (Medical Email
11 Message (Dkt. No. 54-1 at 36)). The email ends with a request that the human-resources representative
12 remind company managers of "the need to keep any medical test results confidential." (*Id.*).

13 Just as the issues related to data falsification reached a climax in mid-2009, so too did the issues
14 related to medical privacy. In June 2009, Plaintiff and other employees were asked to complete certain
15 medical-history forms and return them to their managers. (Clark Decl. 12 (Dkt. No. 53-1)). In an email
16 message to his supervisor, Plaintiff again expressed concern about his company's medical-privacy
17 policies. (Second Medical Email Message (Dkt. No. 54-1 at 53-55)). The supervisor told Plaintiff that
18 the matter had been referred to the company's legal department. The supervisor also implicitly told
19 Plaintiff to focus on other matters and to ignore medical-privacy issues by telling him that "there is
20 plenty of critical work that needs to be done," and asking whether he had followed up on a matter
21 unrelated to his medical-privacy concerns. (*Id.*).

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24 ¹According to Plaintiff, neither he nor the other three employees ever tested positive for drugs. Instead, they failed to
25 pass an "indicator cup test," which in turn triggered a *second* test of their urine samples. All four employees passed the
26 second drug test without a problem. (Clark Decl. 11 (Dkt. No. 53-1)).

1 **C. Defendant's Account**

2 Defendant insists that all of Plaintiff's concerns about data falsification and medical privacy
3 were seriously considered and appropriately resolved. Defendant further insists that Plaintiff's
4 employment was terminated for a single reason—because of Plaintiff's "aggressive and disruptive
5 behavior" and his "insubordinate attitude." (Motion 1, 11 (Dkt. No. 45)).

6 Shortly after Plaintiff first reported his concerns about potential data falsification, company
7 management sent an email message to all air-measurement staff reminding employees of the importance
8 of data integrity. The email message contained excerpts from the company's quality-management plan
9 dealing with ethics and integrity. In part, the relevant section reminded employees that "altering or
10 fabricating test results is strictly prohibited," and that "professional care must be used to ensure that the
11 processing or manipulation of field data . . . preserves the integrity of all data." (Ethics Email Message
12 (Dkt. No. 46-1 at 20–21)). Defendant also takes issue with Plaintiff's characterization of the internal
13 company investigation headed by Mr. Andrew Johnson. Defendant argues that Plaintiff's description of
14 Mr. Johnson's internal investigation as a "cover-up" amounts to nothing more than a "bald allegation."
15 (Reply 8 (Dkt. No. 56)).

16 Defendant also insists that Plaintiff's employment was terminated because of his poor
17 performance, and not out of any retaliatory motive. According to Defendant, Plaintiff took personal
18 affront to legitimate business decisions. For example, Defendant describes the decision to re-assign
19 Plaintiff to the company's northwest office as a "reorganization decision based on budgeting and
20 efficiency issues." (Motion 7 (Dkt. No. 45)). Defendant notes that Plaintiff received the same salary and
21 benefits after his re-transfer to the company's northwest office that he had received while working as the
22 company's group manager for the western United States. Finally, Defendant also notes that a company
23 supervisor sent an explanatory email message to all people affected by the decision which expressly
24 disclaimed any intention to punish Plaintiff. (*Id.*).

1 Defendant argues that Plaintiff ignored these realities, and that he instead interpreted legitimate
2 economic decisions as personal attacks upon him. Defendant further argues that Plaintiff responded by
3 behaving in an insubordinate manner. In support of this argument, Defendant offers the declaration of an
4 employee whom Plaintiff supervised. In relevant part, the employee describes comportment which she
5 characterizes as “continued mismanagement, poor communication, disruptive behavior, unwarranted
6 finger-pointing, and flat-out dishonesty.” (Aasland Decl. 3 (Dkt. No. 48)). The employee’s problems
7 with Plaintiff culminated in June 2009, when she composed a letter to company supervisors describing
8 her complaints in full. In the letter, she alleges, *inter alia*, that Plaintiff expressly forbade her from
9 communicating with certain company supervisors, and that Plaintiff himself consistently ignored direct
10 orders from company supervisors. (Aasland Letter (DKt. No. 48-1)).

11 **II. LEGAL STANDARD**

12 Rule 56 of the Federal Rules of Civil Procedure states that this Court should render summary
13 judgment “if the pleadings, the discovery and disclosure materials on file, and any affidavits show that
14 that there is no genuine issue as to any material fact and that the movant is entitled to judgment as a
15 matter of law.” FED. R. CIV. P. 56(c). Under the terms of Rule 56, a defendant may move for summary
16 judgment by alleging that the plaintiff cannot produce evidence to support an essential element of the
17 plaintiff’s case. *Celotex Corp. v. Catrett*, 477 U.S. 317, 323 (1985). “In such a situation, there can be
18 ‘no genuine issue as to any material fact,’ since a complete failure of proof concerning an essential
19 element of the [plaintiff’s] case necessarily renders all other facts immaterial.” *Id.* A plaintiff
20 overcomes such a motion by producing some quantum of evidence with respect to the disputed
21 element. *Id.* at 324. In attempting to meet his or her burden, the plaintiff cannot rely on the allegations
22 contained in the complaint itself, but must instead produce evidence that could be reduced to a form
23 which is admissible at trial. *Matsushita Electric Industrial Co. v. Zenith Radio Corp.*, 475 U.S. 574,
24 587 (1986).

1 If this Court wrongly enters summary judgment against a plaintiff, it has invaded the province of
2 the jury and deprived the plaintiff of his Seventh Amendment right to a jury trial. *Cox v. English-*
3 *American Underwriters*, 245 F.2d 330, 333 (9th Cir. 1957). In some circumstances, summary judgment
4 is improper even when the material facts are undisputed: “Summary judgment should not be granted
5 where contradictory inferences may be drawn from undisputed evidentiary facts.” *United States v.*
6 *Perry*, 431 F.2d 1020, 1022 (9th Cir. 1970).

7 **III. RELEVANT LAW**

8 In order to prevail on a claim for wrongful employment termination in violation of public policy,
9 a plaintiff must demonstrate (1) the existence of a clear public policy; (2) that discouraging the conduct
10 in which he or she engaged would jeopardize the public policy; (3) that his or her public-policy-based
11 conduct was the cause of the employment termination. *Gardner v. Loomis Armored, Inc.*, 913 P.2d 377,
12 382 (Wash. 1996). If a plaintiff demonstrates all three of the elements, a defendant can nonetheless
13 prevail if the defendant successfully demonstrates “an overriding justification for the dismissal.” *Id.*

14 The existence of a “clear public policy” is a pure question of law, reserved to the Court.
15 *Korslund v. DynCorp Tri-Cities Services, Inc.*, 125 P.3d 119, 126 (Wash. 2005). In order to resolve the
16 inquiry, this Court generally confines its analysis to expressions of popular will, considering only
17 “whether the employer’s conduct contravenes the letter or purpose of a constitutional, statutory, or
18 regulatory provision or scheme.” *Thompson v. St. Regis Paper Co.*, 685 P.2d 1081, 1089 (Wash. 1984).
19 While Washington State law is clear that “[p]rior judicial decisions may also establish relevant public
20 policy,” it is equally clear that “courts should proceed cautiously if called upon to declare public policy
21 absent some prior legislative or judicial expression on the subject.” *Id.* (emphasis omitted).

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1 In order to demonstrate that the termination of his or her employment “jeopardizes a clear public
2 policy,” a plaintiff must show that he or she “engaged in particular conduct, and that the conduct
3 *directly relates* to the public policy, or was *necessary* for the effective enforcement of the public
4 policy.” *Gardner*, 913 P.2d at 945 (emphasis in original). To meet this burden, a plaintiff must
5 demonstrate that “other means for promoting the policy are inadequate,” and that “the threat of dismissal
6 will discourage others from engaging in the desirable conduct.” *Id.* (internal markings omitted).

7 Finally, in order to establish that the public-policy-based conduct was the cause of the
8 termination, a plaintiff must demonstrate the existence of “a nexus between his discharge and the
9 alleged public-policy violations.” *Havens v. C&D Plastics, Inc.*, 876 P.2d 435, 446 (Wash. 1994). A
10 plaintiff cannot satisfy this burden merely by establishing that he or she was discharged after having
11 engaged in behavior that implicates public-policy concerns. *Campbell v. Lockheed Shipping Co.*, 785
12 P.2d 459, 461 (Wash. App. 1990) (“The timing of the discharge alone . . . is insufficient evidence of
13 improper motive[.]”). It is possible, however, for a plaintiff to satisfy his or her burden with respect to
14 the element of causation by relying exclusively on circumstantial evidence. As the Washington State
15 Supreme Court has explained: “Proof of the employer’s motivation may be difficult for the employee to
16 obtain. Ordinarily, the *prima facie* case must, in the nature of things, be shown by circumstantial
17 evidence, since the employer is not apt to announce retaliation as his motive.” *Wilmot v. Kaiser*
18 *Aluminum & Chemical Corp.*, 821 P.2d 18, 30 (Wash. 1991) (internal markings omitted).

19 Even if a plaintiff manages to establish all three elements of the tort for wrongful termination in
20 violation of public policy, a defendant can nonetheless prevail. A defendant prevails under such
21 circumstances if he or she demonstrates “an overriding reason for terminating the employee despite the
22 employee’s public-policy-linked conduct.” *Gardner*, 913 P.2d at 385. This affirmative defense
23 “acknowledges that some public policies, even if clearly mandated, are not strong enough to warrant
24 interfering with employers’ personnel management.” *Id.*

1 **IV. PUBLIC POLICY**

2 Plaintiff argues that Defendant violated two separate public policies when it terminated his
3 employment. Plaintiff argues that Defendant’s alleged conduct violated the public-policy goals of the
4 United States Clean Air Act of 1963 and the Washington State Health-Care Information Act of 1991.

5 **A. Clean Air Act of 1963**

6 Having found that air pollution creates “mounting dangers to the public health and welfare,”
7 Congress passed the Clean Air Act in order to “protect the nation’s air resources so as to promote the
8 public health and welfare and productive capacity of its population.” Clean Air Act of 1963, Pub. L. 88-
9 206, 77 Stat. 392–401 (1963), *codified in relevant part at* 42 U.S.C. §§ 7401 *et seq.*

10 The Clean Air Act contains a comprehensive enforcement scheme that relies upon both public
11 and private actors. The Act generally authorizes the administrator of the Environmental Protection
12 Agency to promulgate and enforce necessary regulations, 42 U.S.C. § 7601, and expressly authorizes
13 her to require polluting companies to sample emissions and to maintain records of such emissions. *Id.* §
14 7414. The Act also contains a provision which forbids employers from discharging or otherwise
15 disciplining employees for commencing a proceeding that arises under the Act, for testifying in such a
16 proceeding, or for otherwise assisting in such a proceeding. *Id.* § 7622(a)(1)–(3). In the event that an
17 employer unlawfully disciplines an employee who attempts to participate in such a proceeding, the Act
18 provides that the employee may file a complaint with the Secretary of Labor within thirty days after the
19 unlawful discipline occurs. *Id.* § 7622(b)(1).

20 **B. Washington State Health-Care Information Act**

21 Having found that “[h]ealth-care information is personal and sensitive information,” and that
22 improper use or release of such information “may do significant harm to a patient’s interest in privacy,
23 health care, or other interests,” the Washington State Legislature enacted the Uniform Health-Care
24 Information Act in 1991, *codified at* WASH. REV. CODE § 70.02.005 *et seq.* The Act, which governs the
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1 terms under which health-care providers can disclose confidential patient information, creates a general
2 rule that “an agent and employee of a health-care provider may not disclose health-care information
3 about a patient to any other person with the patient’s written authorization.” WASH. REV. CODE §
4 70.02.020.

5 **V. DISCUSSION**

6 Because Plaintiff has demonstrated that the United States Government has a clear public policy
7 of protecting employees who take steps to maintain accurate air-quality records against reprisals from
8 their employers who seek to falsify such records, and because Plaintiff has submitted some evidence that
9 Defendant terminated his employment because he actually took such steps, his claim sounding in
10 allegations of air-data falsification survives. With respect to this first claim, Defendant’s motion for
11 summary judgment is therefore denied.

12 Because Plaintiff has failed to demonstrate that Washington State has an equally clear public
13 policy requiring employers to maintain the health records of their employees in a confidential manner,
14 his claim sounding in allegations of medical-privacy violations fails. On this second claim, Defendant’s
15 motion for summary judgment is therefore granted.

16 **A. Public Policy**

17 The Clean Air Act of 1963 contains a variety of provisions demonstrating a clear public policy
18 of protecting whistleblower employees against reprisal from their employers. The Act requires that
19 certain polluters sample their emissions and that they maintain records of such emission-sampling. *See*
20 42 U.S.C. § 7414. The Act also expressly forbids an employer from terminating the employment of an
21 individual who participates in any proceeding that arises under the terms of the Act. *See id.* §
22 7622(a)(1)–(3). These provisions of law demonstrate a clear public policy of requiring polluting
23 companies to monitor their own pollution levels by using air-quality-testing companies like Defendant
24 TRC Environmental Corporation, and to protect the integrity of the data produced by protecting

1 whistleblowers who allege that companies are falsifying data. Defendant allegedly falsified air-quality
2 data and terminated the employment of an individual who insisted on data integrity. Defendant's alleged
3 conduct therefore "contravene[d] the letter or purpose" of the Clean Air Act, which means that the
4 alleged conduct violated a clear public policy. *See Thompson*, 685 P.2d at 1089.

5 Washington State's Uniform Health-Care Information Act of 1991, on the other hand, nowhere
6 discusses the obligations that *employers* have with respect to the medical privacy of employees. The Act
7 is focused exclusively on "agents and employees of *health-care providers*." *See* WASH. REV. CODE §
8 70.02.020 (emphasis added). The Act defines health-care provider to mean "a person who is licensed,
9 certified, registered, or otherwise authorized by the law of this state to provide health care in the
10 ordinary course of business or practice of a profession." *See id.* § 70.02.010(9). Under the plain terms of
11 the Act, therefore, employers are not subject to its strictures. Without a clear expression of popular will
12 governing the treatment of medical information by *employers*, this Court heeds the Washington State
13 Supreme Court's injunction that "courts should proceed cautiously if called upon to declare public
14 policy absent some prior legislative or judicial expression on the subject." *See Thompson*, 685 P.2d at
15 1089. The Court therefore finds that Plaintiff has failed to establish a clear public policy protecting
16 employees who complain about their employers' medical-privacy policies.

17 **B. Jeopardy**

18 Plaintiff has successfully demonstrated that Defendant's alleged conduct would jeopardize the
19 efficacy of the nation's clean-air policies. If an air-testing company could require all its employees to
20 face the Hobson's choice of either participating in the falsification of air-quality data or losing their
21 jobs, many employees would place their own well-being above whatever qualms they experience about
22 data falsification. The Clean Air Act of 1963 requires, however, that *accurate* air-quality data be
23 provided to the appropriate regulatory authorities. *See* 42 U.S.C. § 7414. Because Defendant's alleged
24 conduct would require employees to choose between supplying *inaccurate* information and losing their
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1 jobs, the allegedly wrongful termination would “discourage others from engaging in the desirable
2 conduct,” and thereby jeopardize the nation’s clean-air policies. *See Gardner*, 913 P.2d at 945. Plaintiff
3 has therefore submitted evidence tending to indicate that under the circumstances of this case,
4 employment protections for whistleblowers is “necessary for the effective enforcement of public
5 policy.” *See id.* (internal emphasis removed).

6 **C. Cause**

7 Finally, Plaintiff has also presented evidence which tends to indicate that his employment was
8 terminated because of behavior which triggers public-policy protections. Approximately six months
9 after Plaintiff was charged with the responsibility of supervising Defendant’s air-management group in
10 the United States, and only two weeks after he reported ethical concerns to management, Defendant
11 removed Plaintiff from his new position and re-assigned him to the company’s northwest office. (*See*
12 *Clark Decl.* 7–8)). Plaintiff has also submitted evidence from which a jury could conclude that
13 Defendant’s internal investigator Mr. Andrew Johnson was more concerned about silencing Plaintiff’s
14 criticisms than he was about rectifying irregularities. This evidence includes an email message from Mr.
15 Johnson to Plaintiff expressly warning Plaintiff to refrain from discussing his concerns with other
16 employees. (*See Johnson Email Message* (Dkt. No. 54-1 at 34–39)). Some of this evidence is
17 circumstantial. Plaintiff’s case nonetheless survives the motion for summary judgment. As the State
18 Supreme Court has stated: “Ordinarily, the *prima facie* case must, in the nature of things, be shown by
19 circumstantial evidence, since the employer is not apt to announce retaliation as his motive.” *See*
20 *Wilmot*, 821 P.2d at 30.

21 **D. Overriding Reason**

22 Defendant argues that this Court should dismiss Plaintiff’s claim because Defendant “has
23 provided an overriding justification for the termination decision.” (*See Motion 20* (Dkt. No. 45)).
24 Defendant argues that Plaintiff’s employment was terminated because he behaved in an inappropriate
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1 and insubordinate manner, and not because he expressed concerns about air-data falsification. (*See id.*).
2 Defendant offers substantial evidence to support its position, including the testimony of one of
3 Plaintiff's subordinates, who describes "continued mismanagement, poor communication, disruptive
4 behavior, unwarranted finger-pointing, and flat-out dishonesty." (*See Aasland Decl. 3 (Dkt. No. 48)*).

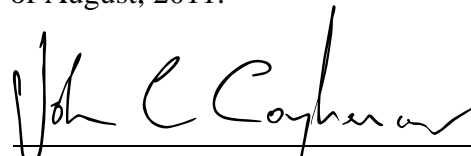
5 Defendant shall have the opportunity to present this argument and supporting evidence to the
6 jury. If the jury believes Defendant's account, Defendant shall prevail. At this stage of the proceedings,
7 however, judgment for Defendant is improper. Because different inferences can arise from the facts of
8 this case, and because "[s]ummary judgment should not be granted where contradictory inferences may
9 be drawn from undisputed evidentiary facts," *see Perry*, 431 F.2d at 1022, this Court must deny
10 Defendant's motion for summary judgment. If this Court were to do otherwise, it would be invading the
11 province of the jury and thereby depriving the plaintiff of his Seventh Amendment right to a jury trial.
12 *See Cox*, 245 F.2d at 333.

13 **VI. CONCLUSION**

14 For the aforementioned reasons, the Court hereby GRANTS Defendant's motion for summary
15 judgment in part and DENIES the motion in part. (Dkt. No. 45). The Court therefore DISMISSES
16 Plaintiff's claims which sound in allegations of medical-privacy violations.

17 Because Defendant has failed to demonstrate that it would suffer prejudice if this Court were to
18 admit Plaintiff's proffered evidence, the Court DENIES Defendant's motion to exclude evidence.

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20 SO ORDERED this 19th day of August, 2011.

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23 JOHN C. COUGHENOUR
24 United States District Judge
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